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In the Supreme Court of the United States

OCTOBER TERM, 1984

162.20 ACRES OF LAND, MORE OR LESS, SITUATED IN CLAY COUNTY, MISSISSIPPI, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether noncompliance by federal officials with the requirements of the National Historic Preservation Act, 16 U.S.C. 470f, would establish a legally sufficient defense to the condemnation of private property carried out pursuant to the Declaration of Taking Act, 40 U.S.C. 258a.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	6
Conclusion	11

TABLE OF AUTHORITIES

Cases:

Catlin v. *United States*, 324 U.S. 229	7
Environmental Defense Fund, Inc. v. *Alexander*, 614 F.2d 474, cert. denied, 449 U.S. 919	8
Environmental Defense Fund, Inc. v. *Corps of Eng'r of U.S. Army*, 492 F.2d 1123, aff'g 348 F. Supp. 916	8
Kirby Forest Industries, Inc. v. *United States*, No. 82-1994 (May 21, 1984)	6-7
Maiatico v. *United States*, 302 F.2d 880	8
Seadade Industries, Inc. v. *Florida Power & Light Co.*, 245 So. 2d 209	6
United States v. *6.321 Acres of Land, Etc.*, 479 F.2d 404	7
United States v. *10.69 Acres of Land, Etc.*, 425 F.2d 317	7
United States v. *178.15 Acres of Land, More or Less*, 543 F.2d 1391	9
United States v. *255.25 Acres of Land, More or Less*, 553 F.2d 571	9
United States v. *2,974.49 Acres of Land, More or Less*, 308 F.2d 641	7
United States v. *3,317.39 Acres, Etc.*, 443 F.2d 104, cert. denied, 404 U.S. 1025	7
United States v. *Carey*, 143 F.2d 445	7
United States v. *Cobb*, 328 F.2d 115	7
United States v. *Hayes*, 172 F.2d 677	7
United States v. *Sherwood*, 312 U.S. 584	7

Statutes and rule:

	Page
Declaration of Taking Act, 40 U.S.C. 258a *et seq.*...	3
40 U.S.C. 258a	9
40 U.S.C. 258a-258e	6
National Environmental Policy Act, 42 U.S.C. 4321 *et seq.*	5
§ 102(2)(C), 42 U.S.C. 4332(2)(C)	6
National Historic Preservation Act of 1966, 16 U.S.C. 470 *et seq.*	4
16 U.S.C. 470f	4, 8
Public Buildings Act of 1959, § 7(a), 40 U.S.C. 606(a)	8
Rivers and Harbors Act of 1946, ch. 595, 60 Stat. 634 *et seq.*	2
60 Stat. 635	2
Fed. R. Civ. P. 71A	7

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 65-81) is reported at 733 F.2d 377. The opinion of the district court (Pet. App. 46-63) is reported at 567 F. Supp. 987. An earlier opinion of the court of appeals (Pet. App. 1-20) is reported at 639 F.2d 299. An earlier opinion of the district court (Pet. App. 21-31) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 82) was entered on June 4, 1984. A timely petition

for rehearing was denied on July 2, 1984 (Pet. App. 84). The petition for a writ of certiorari was filed on September 28, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The individual petitioners were owners of property located near the Tombigbee River in Clay County, Mississippi. Petitioners' former property, which contains a four-room, one-story, nineteenth century dwelling known as Cedar Oaks, is within the area formerly occupied (circa 1848-1870) by the subsequently abandoned riverfront town of Barton. In connection with the Tennessee-Tombigbee Waterway Project, authorized by the Rivers and Harbors Act of 1946, ch. 595, 60 Stat. 634, 635, the United States Army Corps of Engineers plans to incorporate the Cedar Oaks site into the "Barton Ferry Recreation Area," an area that will also include the abandoned riverfront towns of Colbert (circa 1830-1847) and Vinton (circa 1849-1900). Cedar Oaks and the Barton townsite are listed on the National Register of Historic Places as within the Tombigbee River Multi-Resource District, a zone created for the purpose of listing historic sites in the project area (Pet. App. 65-66).

In July 1977, the Corps gave notice to petitioners that it intended to acquire their property for use in the Barton Ferry Recreation Area. Petitioners thereafter submitted to the Attorney General of the United States an "Application to Exclude Property from Condemnation Proceeding." The application explained that petitioners used the land as a tree farm, and

that their crop was ready for harvest.[1] The application further stated that petitioners had previously established campsites on the property, that they had permitted church and youth groups to camp on the property without charge, and that they intended to establish additional campsites. Petitioners asked to be permitted to continue to develop the property at their own expense for public recreation, timber production, and for maintenance of their own residence. The application declared that petitioners' property was not essential to the project; petitioners explained that the property of another landowner, lying south of petitioners' property (and omitted from the proposed condemnation), was equally suitable for use as camp grounds.

The petitioners' application was not favorably received, and on February 14, 1978, the United States filed a complaint and declaration of taking, together with a deposit of estimated just compensation, covering petitioners' property. Pursuant to the Declaration of Taking Act, 40 U.S.C. 258a *et seq.*, the district court promptly entered a judgment on the declaration of taking (Pet. App. 5). Thereafter, on April 6 and 14, 1978, petitioners filed answers that raised four defenses to the condemnation action (Pet. App. 5): (1) that the complaint did not state a cause of action; (2) that the complaint did not contain a short and plain statement of the use for which the property was taken; (3) that there was no public necessity for the taking; and (4) that the government had failed to

[1] Petitioners had originally scheduled a timber sale for December 1975. When the Corps realized the adverse impact that a timber cut would have on the aesthetics of the area (which was to be used for recreational purposes), the Corps obtained a delay of the sale. Thereafter, in July 1976, the Corps purchased the timber rights for $63,000.

comply with the provisions of the National Historic Preservation Act of 1966 ("NHP Act"), 16 U.S.C. 470 *et seq.*[2]

2. After a hearing, the district court granted the government's motion to strike these defenses (Pet. App. 21-31). With respect to the fourth defense, the court stated (*id.* at 27-28) that "[t]he government does not contend that the Corps of Engineers is not required to comply with the [NHP] Act [but] * * * that the Corps is now in compliance therewith." The government contended only, as the court noted (*id.* at 28; emphasis added), "that it is not required to comply with the [NHP] Act *before* it can exercise the right of eminent domain in the action *sub judice*." Based on a stipulation as to the amount of compensation that would be due if the government had the legal right to condemn the property, the court entered a final judgment on August 19, 1980 (Pet. App. 34-37).

The court of appeals affirmed in part, vacated in part, and remanded (Pet. App. 1-20). The court held (*id.* at 14-16) that alleged noncompliance by federal officials with the mandate of the NHP Act is not a legally sufficient defense to entry of a judgment reflecting transfer of title pursuant to a declaration of taking. The court of appeals ruled, however, that a district court may enforce the NHP Act in a condemnation action by withholding an order granting actual possession to the government or may grant injunctive relief requiring compliance with the Act (Pet. App. 16-19). The court of appeals thus af-

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[2] 16 U.S.C. 470f requires federal agencies to consider the impact of any proposed agency project upon any site listed on the National Register of Historic Places prior to the expenditure of federal funds on the project.

firmed the judgment transferring title and the striking of petitioners' NHP Act defense in the condemnation proceedings, but remanded the case to the district court for that court to determine, in the first instance, whether the Corps of Engineers had in fact complied with the NHP Act, and, if not, what remedy would be appropriate (Pet. App. 19-20). The court of appeals subsequently denied a petition for rehearing en banc (644 F.2d 34) and this Court denied a petition for a writ of certiorari. 454 U.S. 828 (1981).

3. On remand to the district court, petitioners filed a "counter-claim" setting forth two claims for relief: (1) failure to comply with the NHP Act and (2) noncompliance with the National Environmental Policy Act (NEPA), 42 U.S.C. 4321, *et seq.* (The latter issue had not previously been raised in this case.) The government's motion to dismiss the counterclaim was denied, but a subsequent government motion for summary judgment was granted (Pet. App. 46). The district court held "that full NHPA compliance has now taken place" (Pet. App. 50). On the NEPA issue, the court ruled that the Corps' environmental studies were timely, and that the analysis therein was adequate (Pet. App. 54-61).

Petitioners again appealed to the Fifth Circuit, which affirmed the district court's judgment (Pet. App. 65-81). The court of appeals declined to reconsider its prior holding that noncompliance with the NHP Act is not a valid defense to transfer of title in a condemnation action under the Declaration of Taking Act (Pet. App. 71), and held that the Corps had satisfied its obligations under that Act (Pet. App. 77-79). The court also held that the Corps was not required to perform a site-specific environmental impact statement on the Barton Ferry recreation area project. The court of appeals con-

cluded that a more broadly framed programmatic Environmental Impact Statement (EIS) that had been prepared by the Corps contained all of the analyses required by Section 102(2)(C) of NEPA, 42 U.S.C. 4332(2)(C) (Pet. App. 79-81).

ARGUMENT

This is the second time this case has been before this Court on the question presented for review. As we did when the case was last here, we note that the decision below is correct, and does not conflict with any decision of this Court or of any other court of appeals.[3] There is no more occasion for further review here than there was when the case was last before this Court. To the contrary, because the courts below have now determined that the Corps of Engineers has fully complied with the requirements of the NHP Act, the prediction, contained in our earlier brief in opposition (No. 80-1999, at 8), that "[t]he controversy between petitioners and the United States may be fully resolved by the district court on remand, without any necessity for review by this Court," has proven correct.

1. a. The Declaration of Taking Act, 40 U.S.C. 258a-258e, was enacted by Congress to enable the federal government to secure prompt transfer of title to property, free of technical defenses. See *Kirby*

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[3] Inasmuch as petitioners concede (Pet. 10) that the two decisions of the court of appeals in this case are thus far the only ones that have addressed the issue presented here, the conflict among district court decisions noted by petitioners presents no occasion for further review.

Petitioners contend (Pet. 24), as they did in their earlier petition, that the decision below conflicts with the Florida Supreme Court's decision in *Seadade Industries, Inc.* v. *Florida Power & Light Co.*, 245 So. 2d 209 (1971). That case, however, involved only questions of Florida condemnation law.

Forest Industries, Inc. v. *United States*, No. 82-1994 (May 21, 1984), slip op. 2-3. Thus, when the United States files a declaration of taking and deposits the estimated compensation in the registry of the district court, title to the estate described in the declaration vests immediately in the United States. *Id.* at 3. Once title vests under the Act, the district court lacks the power to dismiss the proceedings (*United States* v. *Cobb*, 328 F.2d 115, 116 (9th Cir. 1964); *United States* v. *2,974.49 Acres of Land, More or Less*, 308 F.2d 641, 643 (4th Cir. 1962)); title cannot be revested in the former owner either by voluntary dismissal of the condemnation petition by the government (*United States* v. *Carey*, 143 F.2d 445, 450 (9th Cir. 1944)), or by dismissal of the petition because of want of prosecution (*United States* v. *Hayes*, 172 F.2d 677, 679 (9th Cir. 1949)).[4]

Because condemnation proceedings rest upon the sovereign's exercise of its power of eminent domain, the only defense that may be considered is lack of authority in the condemning agency to carry out the acquisition. See, *e.g.*, *Catlin* v. *United States*, 324 U.S. 229, 240-241 (1945).[5] Here, Congress has clearly

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[4] Because the sovereign may not be sued without its consent (*United States* v. *Sherwood*, 312 U.S. 584, 590 (1941)), a landowner may not file a counterclaim in a condemnation proceeding brought under Fed. R. Civ. P. 71A. *United States* v. *6.321 Acres of Land, Etc.*, 479 F.2d 404, 406-407 (1st Cir. 1973); *United States* v. *3,317.39 Acres, Etc.*, 443 F.2d 104, 106 (8th Cir. 1971), cert. denied, 404 U.S. 1025 (1972). Of course, a landowner may file an independent action to enforce other statutes.

[5] The cases upon which petitioners rely (see Pet. 9) merely illustrate this principle. In *United States* v. *10.69 Acres of Land, Etc.*, 425 F.2d 317 (1970), the Ninth Circuit held that the government lacked authority to condemn unallotted Indian

authorized the project for which petitioners' property was taken, and nearly $1 billion has been appropriated for the project.[6]

b. The National Historic Preservation Act of 1966 ("NHP Act"), 16 U.S.C. 470f, is a procedural statute designed to protect our nation's cultural heritage by assuring that a good faith consideration of preservation values is undertaken before the federal government takes or permits action that could damage or destroy properties listed on the National Register of Historic Places. See page 4 note 2, *supra*.[7] For purposes of the NHP Act, however, a transfer of title under the Declaration of Taking Act is a "neutral" act—it cannot result in any adverse impact on pres-

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tribal land (which it held in trust for a tribe), without first complying with certain administrative procedures that had been expressly imposed by Congress. Likewise, in *Maiatico* v. *United States*, 302 F.2d 880 (D.C. Cir. 1962), the court held that the Administrator of the General Services Administration had no authority to acquire a building in the District of Columbia that was not within the "taking area" defined by Congress in Section 7(a) of the Public Buildings Act of 1959, 40 U.S.C. 606(a), and for which GSA had not obtained approval from the House and Senate Committees on Public Works, as required by the statute.

[6] See *Environmental Defense Fund, Inc.* v. *Corps of Eng'r of U.S. Army*, 492 F.2d 1123, 1127-1128 (5th Cir. 1974), aff'g 348 F. Supp. 916 (N.D. Miss. 1972); *Environmental Defense Fund, Inc.* v. *Alexander*, 614 F.2d 474 (5th Cir.), cert. denied, 449 U.S. 919 (1980).

[7] The NHP Act is addressed to federal action; it neither enhances nor diminishes the rights of property owners. Thus, preservation of a structure is not required simply because it is listed (or is eligible for listing) on the National Register. A private property owner remains legally free to alter, or even to destroy, his own structure.

ervation values.[8] Accordingly, as the court of appeals explained (Pet. App. 16-20), the requirements of the Declaration of Taking Act and the NHP Act are not irreconcilable.

The Declaration of Taking Act allows the government unconditionally to acquire title to property effective immediately upon the filing of a declaration of taking and the deposit of estimated just compensation. At the same time, in the event that a transfer of possession following the transfer of the title threatens the cultural values singled out for sensitive consideration by the NHP Act, the Declaration of Taking Act provides a remedy: the court may withhold physical possession from the United States and enjoin construction or any activity that may disturb the cultural or physical environment, pending compliance with the congressional mandate. 40 U.S.C. 258a.[9] Likewise, the court has the authority in a

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[8] As the court of appeals observed on the initial appeal in this case (Pet. App. 16 n.5), the courts of appeals have held that compliance with the National Environmental Policy Act (which requires consideration of environmental consequences of federal agency action) is "irrelevant" to the validity of a taking under the Declaration of Taking Act. See *United States* v. *178.15 Acres of Land, More or Less*, 543 F.2d 1391 (4th Cir. 1976); *United States* v. *255.25 Acres of Land, More or Less*, 553 F.2d 571 (8th Cir. 1977).

[9] On petitioners' initial appeal the court of appeals declined to determine whether the Corps had in fact complied with the NHP Act in this case. Instead, the court remanded the case so that the district court could determine in the first instance whether compliance had occurred. After reviewing the parties' submissions on remand, the district court held that the government had complied with the NHP Act (Pet. App. 52-54), and the court of appeals affirmed (Pet. App. 65-81). There accordingly was no occasion for the courts below to consider whether any relief against the government was warranted.

separate action to enjoin a project when the government has not complied with the NHP Act. Thus, unlike the project activities that may (absent judicial restraint) follow a formal taking, a mere transfer of title pursuant to the Declaration of Taking Act in no event undercuts the enforcement of the NHP Act. It follows that noncompliance with the NHP Act provides no defense to entry of a judgment transferring title.

2. In any event, even if the court of appeals' analysis of the interplay between the Declaration of Taking Act and the NHP Act were erroneous, there is no meaningful relief that could now be awarded to petitioners. Following the court of appeals' remand (and the denial of petitioners' initial certiorari petition presenting the question now tendered for review), the district court determined that the Corps had fully complied with the NHP Act. The court of appeals upheld that ruling, and petitioners do not seek review thereof. Accordingly, even if noncompliance with the NHP Act were held to bar a transfer of title under the Declaration of Taking Act, there is no longer any barrier to transfer of title in this case. Because the practical consequences of a reversal would be insignificant, no further review is warranted here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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